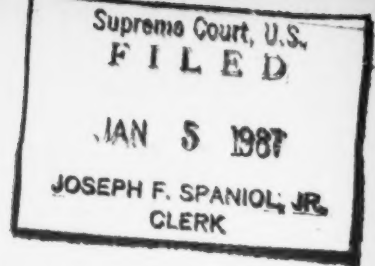


2
NO. 86-963



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

BROOKPARK NEWS & BOOKS, INC., ET AL.,

Petitioners,

-vs-

CITY OF CLEVELAND, ET AL.,

Respondents

BRIEF IN OPPOSITION

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Director of Law

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ATTORNEYS FOR RESPONDENTS

0818



QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court of the United States review, pursuant to Rule 17, factual disputes decided by the Courts of the State of Ohio and non-litigated constitutional questions which were remanded by the Court of Appeals to the trial court for a de novo hearing.
2. Should the Supreme Court grant certiorari where the Petitioner is requesting what the State Court of Appeals has already granted by way of remand for trial, namely, a review of the facts underlying the claim of constitutional deprivations.

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NO. 86-963

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

BROOKPARK NEWS & BOOKS, INC., ET AL.,

Petitioners,

-vs-

CITY OF CLEVELAND, ET AL.,

Respondents

STATEMENT OF THE CASE

The within appeal arose from an application for change of use from a

"bookstore" to a "bookstore and mini-motion picture theater", the denial thereof, and a subsequent appeal to the Board of Zoning Appeals (hereinafter "Board") of the City of Cleveland.

The use variance was denied by Resolution of the Board and Petitioner, Brookpark News & Books Inc. (hereinafter "Brookpark"), filed its Administrative Appeal to the Court of Common Pleas, pursuant to Ch. 2506, Ohio Revised Code.

The Court of Common Pleas affirmed the decision of the Board, and thereafter an appeal was filed with the Court of Appeals for the Eighth Judicial District (Cuyahoga County), which affirmed the trial court on zoning and spacing claims but remanded for a trial de novo on the constitutional issues. (Appendix A-2).

Thereafter, Petitioners filed a Notice of Appeal requesting the Ohio Supreme Court to certify the Record and, on September 10, 1986, the Supreme Court of Ohio overruled the Petitioners' Motion to Certify the Record (See A-1).

From the decision of the Ohio Supreme Court denying jurisdiction, Petitioners filed the within Petition for a Writ of Certiorari.

STATEMENT OF FACTS

Brookpark, on December 2, 1983, received use permit No. M-103443 for use of the premises at 16700 Brookpark" . . . for retail sales of new[s] and books . . ." (Appendix A-13), a permitted use in the General Retail District.

On December 28, 1983 an application was made by Brookpark for a permit to change the "use from news and books to Adult bookstore and adult mini-motion picture." (A-3 in Appendix). On December 28, 1983, the permit request was denied because the adult mini-motion picture theater was within 1,000 ft. of an existing adult bookstore as defined in the Zoning Code, and thus was prohibited by Section 343.11¹(b)(L) of the Zoning Code.

Brookpark, however, without a permit for such use, and with a permit

only for sales of news and books, had commenced operating the mini-motion picture theater and adult bookstore. Permit M-103443 was then cancelled on January 3, 1984 because Brookpark's premises were being used for a mini-motion picture theater and adult bookstore in violation of Section 343.11(b)(L), in that it was within 1,000 ft. of an adult bookstore and mini-motion picture theater.

Located to the east of 16700 Brookpark are an adult bookstore and mini-motion picture theater located, respectively, 280 feet from the 16500 Brookpark address and the other 300 feet from the subject structure.

Thereafter, Brookpark appealed to the Board to convert the use at the subject premises to an adult bookstore and adult mini-motion picture theater; after

hearing, the appeal was denied by Decision and Order of the Board (Appendix A-15).

Brookpark thereafter filed an administrative appeal with the Court of Common Pleas claiming that the action of the Board was contrary to law and not supported by the evidence and further, that Zoning Code Section 343.11(b)(L) was unconstitutional for vagueness and for discriminating against theaters. After reviewing all the facts in the Record before it, but without holding a trial de novo, the Court sustained the Decision and Order of the Board.

A further appeal to the Court of Appeals followed. The Court of Appeals, after reviewing the facts, upheld the spacing requirements but reversed and remanded for trial as to the constitutional issues raised by

Petitioners. Because of Petitioners' subsequent appeal to the Ohio Supreme Court and instant Petition for Writ of Certiorari, that trial has not been held.

- I. PETITIONERS HAVE ALREADY OBTAINED ALL THE RELIEF SOUGHT IN ITS PETITION, IN THAT THE CONSTITUTIONAL CLAIMS RAISED HEREIN WERE CONSIDERED BY THE OHIO COURT OF APPEALS, WHICH ORDERED THE CASE REMANDED TO THE TRIAL COURT FOR DETERMINATION AS TO ALL CONSTITUTIONAL ALLEGATIONS.

Throughout the Petition for Writ of Certiorari, Petitioners consistently claim their constitutional rights were violated and consequently request this Court to relitigate factual disputes which were resolved by the Courts below and the Board.

However, Petitioners fail to direct this Court to the remand order of the Ohio Court of Appeals on the constitutional issues before it. Those issues, which the Ohio Court of Appeals found had not been

decided by the trial court, were substantially identical to these raised in the instant Petition for Writ of Certiorari.

In its decision the Ohio Court of Appeals specifically refers to the constitutional issues now raised by Petitioners. That opinion states categorically at A-8-9 of the Appendix:

The appellant's second and fourth assignments will be addressed together as they present related issues. The appellant's briefs filed in the trial court presented two constitutional issues. First, it argued that the ordinances did not specify whether the spacing restrictions apply when there are two existing regulated uses

within 1,000 feet but which are in an adjacent but differently zoned area. Thus, the appellant argued that the ordinances are unconstitutionally vague in that they fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.

Papachristou v. City of Jacksonville (1972), 405 U.S. 156; United States v. Harriss (1953), 347 U.S. 612. * * *

Their second contention is that, under the ordinances, adult bookstores receive more favored treatment than do theaters.

Their second contention poses more problems. The ordinances prohibit adult movie theaters in

local retail areas but permit them subject to certain restriction in general retail areas. They argue there is no factual basis for the disparate treatment.

In remanding for trial, as to Petitioners' constitutional claims, the Court of Appeals stated, at A-9 of the Appendix:

This Court has determined that issues of constitutionality of zoning restrictions must be tried originally in the Court of Common Pleas. SMC, Inc. v. Laudi (1975), 44 Ohio App. 2d 325; Marquette Steel Company v. Cleveland Bd. of Zoning Appeals (Jan. 3, 1985), Cuyahoga App. No. 48397, unreported; McCreery v.

Brecksville, Bd. of Zoning Appeals
(Dec. 27, 1984), Cuyahoga App. No. 48396, unreported. We conclude that these issues should have been tried originally in the trial court as scheduled; therefore, the assignments have merit. It was error to deny the appellants an opportunity to present further evidence on the constitutional issues raised rather than summarily dismissing the appeal without a hearing.

The Court concluded, at Appendix

A-12:

For the reasons detailed in Section II of this opinion, the judgment of the trial court is reversed and remanded for a hearing on the constitutional issues raised by the appellant's appeal.

Thus, Petitioners in effect are praying for precisely the relief that the Ohio Court of Appeals already has granted - remand for trial on their constitutional claims.

II. PETITIONERS WOULD HAVE THIS COURT RECONSIDER FACTUAL DETERMINATIONS PREVIOUSLY MADE BY THE BOARD OF ZONING APPEALS AND THE OHIO COURTS.

In their Argument, Petitioners once again raised factual issues, such as the use permit cancellation for the adjacent bookstore, which were squarely before the Ohio Courts and which were determined by the Ohio Courts.

This particular factual issue was squarely decided by the Ohio Court of Appeals at A-8 of the Appendix, wherein the court, having reviewed the entire

Record before it, found that:

The evidence herein established that the 16500 Brookpark lot had two buildings on it, one housing an adult mini-movie theater and the other housing a bookstore. On November 30, 1983, the City issued a permit changing the use of that establishment from a bookstore to an adult bookstore. This permit was outstanding at the time the appellant applied for a permit at 16700 Brookpark. The appellant insists that the operation of an adult bookstore at 16500 Brookpark had ceased and therefore that permit should not bar the issuance of a permit for 16700 Brookpark. The fact remains that outstanding permits existed for two of the

regulated uses at the time of the appellant's application. The issuance of a third permit would have been in direct contravention of the City Ordinances. This assignment is overruled.

It is, of course, the province of the trial courts to consider the evidence before it and to determine the credibility and the weight to be given it. Nevertheless, Petitioners would have this Court review specifically that decision of the trial Court, which already has been affirmed by the Ohio Court of Appeals and further subject to review by the Ohio Supreme Court. The basis for Petitioners' attack is the claim that they had ceased to operate the adult bookstore at 16500 Brookpark Road at the time of the application for a permit for 16700 Brookpark. As the opinion of the Ohio

Court of Appeals makes abundantly clear, this Court was aware of that fact, but found more persuasive the uncontroverted fact that Petitioners continued to maintain their permit to operate the 16500 adult bookstore, which the court found would have made "issuance of a third permit . . . in direct contravention of the City Ordinances."

The determination of the Board of Zoning Appeals and of the Ohio Courts was based upon a full review of all the competent, credible evidence submitted. Petitioners thus would have this Court substitute their own evaluation of that evidence for the decisions below, and would cast this Court in the role of a Super Board of Zoning Appeals. The record fully supports the determination of the Ohio Court of Appeals, and the Ohio

Supreme Court as to those factual matters before them.

CONCLUSION

From a careful reading of the Petition it is clear that Petitioners would have this Court again consider factual issues already decided by the courts below and the Board of Zoning Appeals.

Also, the Petition meets none of the jurisdictional requirements of Rule 17 of the Supreme Court Rules.

Therefore, for all the foregoing reasons, this Court should deny the writ.

Respectfully submitted,

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Director of Law

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CERTIFICATE OF SERVICE

Three copies of the foregoing
Brief In Opposition have been served upon
the following parties and/or counsel of
record, by U.S. mail, postage prepaid

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STUART A. FRIEDMAN
Counsel for Respondents

APPENDIX

**ORDER OF SUPREME COURT OF OHIO
DISMISSING APPEAL**

(Dated September 10, 1986)

Case No. 86-1195

**THE SUPREME COURT OF OHIO
COLUMBUS**

**BROOKPARK NEWS & BOOKS, INC., et al.,
*Appellants,***

v.

**CITY OF CLEVELAND, et al.,
*Appellees.***

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, \$20.00, paid by Rogers, Horton, Forbes & Teamor.

**/s/ FRANK D. CELEBREZZE
Chief Justice**

**JOURNAL ENTRY AND OPINION OF THE COURT
OF APPEALS FOR CUYAHOGA COUNTY**

(Decided May 22, 1986)

No. 50651

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

BROOKPARK NEWS & BOOKS, INC. *et al.*

Plaintiff-Appellants,

vs.

CITY OF CLEVELAND, *et al.*,

Defendant-Appellees.

JOURNAL ENTRY AND OPINION

CHARACTER OF PROCEEDINGS:

CIVIL APPEAL FROM THE
COMMON PLEAS COURT
CASE NO. 071,205

JUDGMENT:

REVERSED AND REMANDED

CORRIGAN, J.:

This appeal arose from an application for a change of use from a bookstore to an adult bookstore and a mini-motion picture theater, the denial thereof, and a subsequent appeal to the Board of Zoning Appeals. The use variance was denied by a resolution of the Board and the appellant took an appeal to the Common Pleas Court pur-

suant to R.C. 2506. The Common Pleas Court affirmed and the appellant raises four assignments for our review:

- I. THE TRIAL COURT ERRED IN DENYING THE APPEAL WHERE THE DECISION OF THE BOARD OF ZONING APPEALS WAS CONTRARY TO LAW.
- II. THE TRIAL COURT ERRED IN DENYING THE APPEAL WHERE THE DECISION OF THE BOARD OF ZONING APPEALS WAS UNCONSTITUTIONAL, ARBITRARY, CAPRICIOUS AND UNREASONABLE.
- III. THE TRIAL COURT ERRED IN DENYING THE APPEAL WHERE THE DECISION OF THE BOARD OF ZONING APPEALS WAS UNSUPPORTED BY THE PREPONDERANCE OF SUBSTANTIAL RELIABLE AND PROBATIVE EVIDENCE.
- IV. THE TRIAL COURT ERRED IN NOT CONDUCTING A TRIAL DE NOVO OF APPELLANTS' REQUEST FOR A VARIANCE AND PERMIT FOR THE REASONS THAT APPELLANTS RAISED CONSTITUTIONAL ISSUES IN THEIR APPEAL FROM THE DECISION OF THE BOARD OF ZONING APPEALS.

On December 2, 1983, Brookpark News & Books, Inc. received a use permit for the retail sales of new[s] and books at 16700 Brookpark. On December 28, 1983 an application was made by Brookpark News & Books to change the use to an adult bookstore and an adult mini-motion picture theater. The request was denied on the basis that the operation was within 1000 feet of an existing adult bookstore and a mini-motion picture theater both

located at 16500 Brookpark. Those operations were housed in separate buildings on that lot. The proposed use was located within 280 feet of the existing bookstore and 300 feet from the mini-motion picture theater. An appeal was filed with the Board of Zoning Appeals which was denied. That decision was affirmed by the Common Pleas Court and Brookpark News brought this appeal.

I.

In its first assignment of error, the appellant contends that the trial court erred in affirming the Board of Zoning Appeals' decision as it was contrary to law. Since the resolution of this assignment as well as the second assignment hinges upon an interpretation of provisions of the City of Cleveland Zoning Code, the requirements of the Code will be discussed in some detail.

Chapter 343 of the Cleveland Zoning Code governs the permitted buildings and uses for the various types of districts within the confines of Cleveland. A portion of Chapter 343 addresses specifically the permitted uses of adult movie theaters and bookstores. Those sections contain anti-clustering provisions which attempt to prevent the concentration of adult movie theaters and adult bookstores in various areas throughout the City of Cleveland. The express purpose was to control certain adverse effects in the neighborhoods in which such businesses are situated which tend to contribute to the blighting and downgrading of surrounding neighborhoods, causing surrounding neighborhoods to give the appearance of decline, both economically and residentially. To achieve that end the Code imposes certain spacing requirements on these uses as a direct attempt to prevent the clustering of adult theaters and bookstores and the accompanying debilitating effect on the surrounding areas.

Section 343.01 outlines permitted uses in local retail districts defined as follows:

(1) "Local Retail District" means a business district adjacent to or surrounded on at least three sides by Residence Districts in which such uses are permitted as are normally required for the daily local retail business needs of the residents of the locality only.

The Code then lists the permitted uses in such districts. In pertinent part it provides in Section 343.01 (B) (2) (E):

E. The sale of books, magazines, newspapers, cigars, drugs, flowers, gifts, music, photographic goods, sporting goods, stationery, provided however, that not more than two adult book stores shall be within 1,000 feet of each other. Nor shall such adult book stores be within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976.

Thus, subject to the spacing restrictions, adult movie theaters are permitted in local retail business districts. Section 343.11 defines general retail business districts as follows:

343.11 General Retail Business Districts.

(a) *Definitions.* For the purposes of this chapter, certain terms are defined as follows:

(1) "General retail business" means an enterprise for profit for the convenience and service of, and dealing directly with, and accessible to, the ultimate consumer; neither injurious to adjacent premises

or to the occupants thereof by reason of the emission of cinders, dust, fumes, noise, odors, refuse matter, smoke, vapor or vibrations; nor dangerous to life or property. It includes buildings or spaces necessary to a permitted use for making or storing articles to be sold at retail on the premises. Except as provided in subsection (b) hereof, it does not include any establishment which supplies a retail outlet other than that on the premises, or any building or use specifically mentioned as permitted only in a Semi-Industry or Industry District.

The property at issue here is located in a general retail business district. Section 343.11(b) outlines permitted uses in such areas as follows:

(b) *Permitted Buildings and Uses.*

The following buildings and uses are permitted in a General Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses:

(1) Except as otherwise provided in this Zoning Code, all uses permitted and *as regulated in any Local Retail Business District.*

(2) *All retail business uses and buildings specified in Section 343.01 (b), and uses and buildings to provide for: * * *. [Emphasis added.]*

Thus, uses permitted in local retail areas are also permitted in general retail subject to the same restrictions. Section 343.11(b) goes on to outline additional permitted uses including the permitted use of adult movie

theaters which are not permitted in local retail areas. That section, 343.11(b)(2)(L), provides:

L. Amusement and recreation: armory, assembly hall, bowling alley, dance hall, pool and billiards, theater, skating rink or other social, sport or recreation center operated as a business, provided the place or building in which it is operated is sufficiently sound-insulated to effectively confine the noise to the premises, and provided further that such building or premises is located in conformity with the provisions of Section 347.03; *provided, however, that not more than two of the following uses shall be within 1,000 feet of each other:*

1. Adult motion picture theatre.
2. Adult mini motion picture theatre.
3. Pool or billiard halls.
4. Premises having as their main or primary use pinball machines.

Provided further that the use as specified in subsection L. 1. through 4. inclusive of this subsection shall not be within 1,000 ft. of any adult book store as set forth in Section 343.01; nor within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976. [Emphasis added.]

Thus, contrary to the appellant's position, adult bookstores in a general retail area are subject to the spacing requirements of Section 343.01(b)(2)(E) and adult theaters are permitted in such areas subject to Section 343.11(B)(2)(L). Therefore, the requirements of both Sections are

germane to this appeal. Such a reading of these ordinances is consistent with the intent of the Zoning Code, permitting more uses in the less restricted general retail areas.

Under the ordinances then, no more than two adult bookstores or theaters are permitted within 1,000 feet of each other in a general retail area. The evidence herein established that the 16500 Brookpark lot had two buildings on it, one housing an adult mini-movie theater and the other housing a bookstore. On November 30 1983, the City issued a permit changing the use of that establishment from a bookstore to an adult bookstore. This permit was outstanding at the time the appellant applied for a permit at 16700 Brookpark. The appellant insists that the operation of an adult bookstore at 16500 Brookpark had ceased and therefore that permit should not bar the issuance of a permit for 16700 Brookpark. The fact remains that outstanding permits existed for two of the regulated uses at the time of the appellant's application. The issuance of a third permit would have been in direct contravention of the City Ordinances. This assignment is overruled.

II.

The appellant's second and fourth assignments will be addressed together as they present related issues. The appellant's briefs filed in the trial court presented two constitutional issues. First, it argued that the ordinances did not specify whether the spacing restrictions apply when there are two existing regulated uses within 1,000 feet but which are in an adjacent but differently zoned area. Thus, the appellant argued that the ordinances are unconstitutionally vague in that they fail to give a person of ordinary intelligence fair notice that his contemplated

conduct is forbidden by the statute. *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156; *United States v. Harriss* (1953), 347 U.S. 612.

Their second contention is that under the ordinances, adult bookstores receive more favored treatment than do theaters. In support, they argue that bookstores are permitted on a limited basis in local retail areas and are unrestricted in general retail areas. This contention is erroneous. The ordinances regulated bookstores in both areas equally. Their second contention poses more problems. The ordinances prohibit adult movie theaters in local retail areas but permit them subject to certain restrictions in general retail areas. They argue there is no factual basis for the disparate treatment.

The United States Supreme Court has addressed constitutional challenges of a similar Detroit anti-clustering ordinance. *Young v. American Mini Theatres, Inc.* (1976), 427 U.S. 50. Therein the Court addressed First Amendment and Equal Protection issues raised by such ordinances. The Court did not reach the constitutional issues raised by the appellant here.

The trial court did not conduct a trial *de novo* on these constitutional issues. These issues were not raised before nor addressed by the Zoning Board of Appeals since an administrative body lacks authority to determine, the constitutionality of a zoning ordinance. *FRC of Kamms Corner v. Cleveland Bd. of Zoning Appeals* (1984), 14 Ohio App.3d 372. However, a constitutional issue may be raised for the first time on appeal to the Common Pleas Court in a R.C. 2506 proceeding. *State ex rel. Sibarco v. City of Berea* (1966), 7 Ohio St.2d 85; *cert. denied* (1967), 386 U.S. 957. This Court has determined that issues of constitutionality of zoning restrictions must be tried origin-

ally in the Court of Common Pleas. *SMC, Inc. v. Laudi* (1975), 44 Ohio App.2d 325; *Marquette Steel Company v. Cleveland Bd. of Zoning Appeals* (Jan. 3, 1985), Cuyahoga App. No. 48397, unreported; *McCreery v. Brecksville, Bd. of Zoning Appeals* (Dec. 27, 1984), Cuyahoga App. No. 48396, unreported. We conclude that these issues should have been tried originally in the trial court as scheduled; therefore, the assignments have merit. It was error to deny the appellants an opportunity to present further evidence on the constitutional issues raised rather than summarily dismissing the appeal without a hearing.

III.

In its third assignment of error, Brookpark News contends that in the alternative the Board should have granted a variance to permit its use. The Ohio Supreme Court in *Consolidated Management, Inc. v. City of Cleveland* (1983), 6 Ohio St.3d 238, outlined the three requirements essential for granting a variance. The Court stated:

It is necessary that the board of zoning appeals read, and apply, each subsection of Ordinance Section 329.03 *in pari materia*. Accordingly, in order for the board to grant a specific variance, subsections 329.03 (b) (1), (2) and (3) require that each applicant prove that the zoning classification presents an unnecessary hardship or practical difficulty to the intended use of the property; that refusal of the variance will deprive the owner of substantial property rights; and that the granting of the variance would not be contrary to the intent of the zoning code. [Footnote omitted.]

Id. at 242. The Court in that case specifically found that where the property owner acquired an interest in the prem-

sies with knowledge of the zoning restrictions, he has created his own hardship and cannot thereafter apply for a zoning variance based on such hardship. See also, *Reed v. Rootstown Twp. Bd. of Zoning Appeals* (1984), 9 Ohio St.3d 54. Given the fact that here the appellant entered into a long term lease with knowledge of the zoning restrictions, the appellant has failed to carry its burden of proof in establishing hardship. Furthermore, given the express intent of the anti-clustering provisions the granting of a variance would be directly contrary to the intent of the zoning code. This assignment is overruled.

Although this court from a review of the record made before the Board and the arguments advanced in the briefs might be inclined to rule in favor of the City, we nevertheless are compelled to reverse and remand this case to the trial court. For reasons unknown, the obvious error of the trial court in entering judgment before the scheduled hearing was conducted was not challenged nor called to the trial judge's attention by counsel for either side. No motion seeking clarification, no motion for a new trial, and no request for findings of facts and conclusions of law were ever sought.

For the reasons detailed in Section II of this opinion, the judgment of the trial court is reversed and remanded for a hearing on the constitutional issues raised by the appellant's appeal.

This cause is reversed and remanded for further proceedings consistent with this Journal Entry and Opinion.

It is, therefore, considered that said appellant(s) recover of said appellee(s) its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

NAHRA, P.J., and
KRUPANSKY, J., concur.

/s/ JOHN V. CORRIGAN
Judge

BEST

☒ BUILDING ☐ HOUSING
 PERMIT NO. **M 103443** **CITY OF CLEVELAND**
 DEPARTMENT OF COMMUNITY DEVELOPMENT
 DIVISION OF BUILDING

FEES 3.00
 2 DEC. 1964

IN PURSUANCE OF THE FILING OF THE REQUIRED APPLICATION THERE IS HEREBY ISSUED TO:

DENNIS HADRIK DBA CLASSIC BUILDING SYSTEMS
5530 STATE RD. REGISTERED CONTRACTOR on behalf of
JOSEPH WADE
21405 LUKATH AVE. OWNER of property known as:
 LOCATION: **10760 BROCKWAY RD.** SUB LOT 7CL....
 C.T. 1245

PERMISSION IS HEREBY GRANTED TO: **USE PERMIT**

TO USE STRUCTURE AND ADDITION CONSTRUCTED UNDER PERMIT **M 103443**
 C. OF O. PAID UNDER PERMIT USE FOR RETAIL SALES OF NEW AND BOOKS

PURSUANT TO SECTION 5.0501 OF THE CODIFIED ORDINANCES OF THE CITY OF CLEVELAND, NO
 NEW BUILDING SHALL BE OCCUPIED UNTIL A CERTIFICATE OF OCCUPANCY HAS BEEN ISSUED

SET BACK:

The work or use authorized by this permit must be started on or before **USE PERMIT**
 and the work authorized completed on or before

PERMIT

The issuance of this permit is for the use or work specified in the application filed therefore and any unauthorized change or alteration from the aforesaid application or plans will render this permit null and void. Separate permits must be secured for Plumbing, Wiring, Heating, Elevators, Air Conditioning etc. by Registered or Licensed Contractors ONLY.

THIS PERMIT CONVEYS NO RIGHT TO USE OR OCCUPY ANY STREET, OR SIDEWALK OR PART THEREOF, EITHER TEMPORARILY OR PERMANENTLY.

Keep this Permit Conspicuously Posted on the Above premises at all times.

CHARLES L. SHEBOY
 COMMISSIONER

AVAILABLE COPY

343.11 General Retail Business Districts.

* * * * *

(b) *Permitted Buildings and Uses.*

The following buildings and uses are permitted in a General Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses:

(1) Except as otherwise provided in this Zoning Code, all uses permitted and as regulated in any Local Retail Business District.

(2) All retail business uses and buildings specified in Section 343.01 (b), and uses and buildings to provide for:

* * * * *

L. * * * that not more than two of the following uses shall be within 1,000 feet of each other:

1. Adult motion picture theatre.
2. Adult mini motion picture theatre.
3. Pool or billiard halls.
4. Premises having as their main or primary use pin-ball machines.

Provided further that the use as specified in subsection L. 1. through 4. inclusive of this subsection shall not be within 1,000 ft. of any adult book store as set forth

in Section 343.01; nor within 1,000 ft. from any church, hospital, school, library or playground or to any other use classified as institutional occupancy, nor within 1,000 ft. of a residential district as set forth in Chapter 337 of the Codified Ordinances of Cleveland, 1976. * * *

REQUEST FOR CHANGE OF USE

CLEVELAND BOARD OF ZONING APPEALS

519 City Hall Cleveland, Ohio 44114 216/664-2580

ANTHONY COSTANZO

Secretary

MICHAEL GAETA

Zoning Engineer

February 21, 1984

CALENDAR NO. 83-359

16700 Brookpark Road

RESOLUTION

WHEREAS, Joseph Wade, owner, and Brookpark News & Books Incorporated c/o Joel Kamensky, tenant, appealed from the decision of the Commissioner of Buildings for permission to convert to an adult book store and adult mini-motion picture theatre the 42' x 73' one-story masonry irregular shaped store building on a 150' x 375' lot located in a General Retail District at 16700 Brookpark Road, said conversion being contrary to the provisions of Sections 343.01 and 343.11 of the Codified Ordinances.

WHEREAS, this property is located on the north side of Brookpark Road, approximately 3000' west of West 150th Street.

WHEREAS, after public notice and written notice mailed to ten directly affected property owners, a public hearing was held February 13, 1984.

WHEREAS, after due consideration of the testimony submitted at the said hearing, the Board finds that the appeal should be refused for the following reasons:

1. The evidence establishes that the property has been located in a General Retail District since 1967; that in 1978 the building was constructed as a restaurant; that in 1981 the building was converted

to a massage parlor; that the property to the east at 16500 Brookpark has located thereon two buildings, one of which is classified as an adult book store and the other as an adult mini-motion picture theater; that the property at 16500 is located in a General Industry District which is not subject to the restrictions relating to adult book stores or adult mini-motion picture theaters; that the Code states that no mini-motion picture theater may be placed in a General Retail District if it is located within 1000' of an adult book store; that the proposed use would be within 280' to 300' of the adult book store at 16500.

2. No exceptional local condition exists in this vicinity to justify the Board in amking [sic] the variance requested.
3. Granting the appeal would be detrimental to the general welfare of the neighbors and to the value of their properties and would be contrary to the intent and purpose of the zoning ordinances.
4. In being refused this appeal, the owner will not suffer an unreasonable hardship since he is not denied any use of property not also denied other owners in that district similarly situated; now therefore,

BE IT RESOLVED that the decision of the Commissioner of Buildings heretofore rendered in the within matter be and the same is hereby sustained and the appeal is refused.

Yeas: Jablonski, Schwonek, Palmer

Nays: Cade, Chatman

Approved and adopted by the Board of Zoning Appeals

/s/ **ANTHONY COSTANZO**

Anthony Costanzo, Secretary

BOARD OF ZONING APPEALS

AC:lm

